

APPENDIX.

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 645.

JOSEPH LEE JONES and BARBARA JO JONES,
Petitioners,

v.

ALFRED H. MAYER COMPANY, a Corporation, ALFRED, REALTY
COMPANY, a Corporation, PADDOCK COUNTRY CLUB, INC., a
Corporation, ALFRED H. MAYER, an Individual, and an Officer of the
Above Corporations,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the
Eighth Circuit.

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DOCKET ENTRIES.

Date	Proceedings.
1965	
Sept. 2	Complaint filed and summons issued.
Nov. 5	Submission of defts' motion to dismiss vacated. First Amended complaint filed by leave.
Dec. 6	Defts' motion to dismiss first amended complaint and supporting memo filed.
Dec. 14	Pltffs' brief filed.

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- May 18 Memorandum opinion filed. Order filed and entered sustaining defts' motion to dismiss plttfs' first amended complaint and dismissing amended complaint. Copies of opinion and order mailed to Israel Treiman and to Samuel H. Liberman, II.
- May 26 Pltffs' notice of appeal to the U. S. Court of Appeals from order dismissing first amended complaint entered in this action on May 18, 1966, filed and duplicate thereof mailed to Shifrin, Treiman, Agatstein & Schermer; attorneys for defts.
- July 6 Certified copies of notice of appeal and of docket entries in U. S. District Court filed.
- Appellants filed appearance.
- July 11 Appellees filed appearance.
- Aug. 15 Appellants filed brief.
- Sept. 8 Appellees filed brief.
- Sept. 19 Reply brief of appellants filed.
- Oct. 18 Transferred to calendar of November 1966 session.
- Nov. 18 Argued and submitted to Judge Blackmun, Me-haffy and Lay. Samuel H. Liberman, II for appellant and Israel Treiman for appellee.

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- June 26 Opinion, Judge Blackmun. Judgment affirmed.
- July 10 Motion by appellant for stay of mandate filed.
- Order: Issuance of mandate stayed for period of 30 days.

Aug. 9 Motion by appellant for further stay of issuance of mandate filed. Order for issuance of mandate to stay for further period of 30 days granted.

Sept. 7 Motion by appellant for further stay of issuance of mandate filed. Order for issuance of mandate for stay to October 9, 1967, granted.

Sept. 25 Certificate evidencing docketing of case in U. S. Supreme Court filed.

Dec. 9 Certified copy of order of U. S. Supreme Court granting petition for writ of certiorari filed.

FIRST AMENDED COMPLAINT.

(Filed in U. S. District Court Sept. 2, 1965.)

Come now Plaintiffs and state for their cause of action against the Defendants:

1. Plaintiffs are citizens of the United States of America and are citizens and residents of the State of Missouri: Plaintiffs are husband and wife, and Plaintiff, Joseph Lee Jones is a Negro. Plaintiffs presently reside at 4585 Carter Avenue, St. Louis, Missouri. Mr. Jones is employed by an agency of the federal government, to-wit: the Veteran's Administration at its hospital in St. Louis, Missouri. Mrs. Jones is employed by an agency of the federal government, to-wit: the Veteran's Administration at its West Side Hospital in East St. Louis, Illinois.

2. Each corporate defendant is a Missouri corporation authorized and existing under and by virtue of law, and has its principle place of business in St. Louis County, Missouri. Defendant, Alfred H. Mayer, is a resident of St. Louis County in the State of Missouri and is the managing officer of Defendant Alfred H. Mayer Company and the Defendant Alfred Realty Company. Defendant, Alfred H. Mayer owns a controlling interest in both of said corpo-

rations. Defendant Alfred Realty Company is licensed as a real estate dealer by the State of Missouri through the Missouri Real Estate Commission, and Defendant Mayer, individually, is similarly licensed by said State and Commission. Each of said Defendant Corporations now engages in substantial transactions in interstate commerce and at all times material hereto has been so engaged.

3. The Plaintiffs bring this action to redress the injury done them by the Defendants' concerted, willful refusal to sell a house and lot to Plaintiffs as husband and wife solely because of Plaintiff Joseph Lee Jones' race, in violation of Plaintiffs' rights, privileges, and immunities under the Civil Rights Act of 1866 (42 U. S. C., Sec. 1982), which guarantees all citizens a right to purchase real property equal to that enjoyed by white citizens; the Civil Rights Act of 1870 (42 U. S. C., Sec. 1981), which guarantees all persons the equal right to make and enforce contracts and to the full and equal benefit of all laws and proceedings for the security of property, the Civil Rights Act of 1871 (42 U. S. C., Sec. 1983), which gives a right of action against anyone who, under color of state law, custom or usage, deprives any citizen of a right, privilege, or immunity guaranteed by the Constitution and laws of the United States, the Civil Rights Act of 1964 (42 U. S. C., Sec. 2000), which guarantees to all citizens regardless of race the right to enjoyment of facilities of public accommodation; the Executive Order on Equal Opportunity in Housing (Executive Order No. 11063) which condemns the practice of discrimination in the sale of housing; the Constitution of the United States of America, Amendment Thirteen, which abolishes slavery and the indicia thereof, and Amendment Fourteen, which guarantees that no citizen shall be deprived of his liberty or property without the process of law and that no citizen shall be deprived of equal protection of the laws; and Article I, Section 8, Clause 18 and Article VI of the Constitution of the United

States of America which gives Congress the right to establish various federal agencies, including the Veteran's Administration, and precludes interference with the functioning of said agencies.

4. This Court has jurisdiction pursuant to Title 42, U. S. C., Sec. 1983, and Title 28, U. S. C., Secs. 1331, 1337 and 1343.

5. Defendant Alfred H. Mayer Company is engaged in the business of developing subdivisions, that is, buying and holding parcels of land in St. Louis County, and operating as a construction company in building homes on this land to be resold to the public. Defendant Alfred Realty Company operates as a real estate dealer licensed by the State of Missouri through its Real Estate Commission, and as the exclusive sales agent of the houses built by Defendant Alfred H. Mayer Company. Defendant Alfred H. Mayer serves as managing officer and the guiding policy maker of both the foregoing corporations, and the policies of both of said corporate Defendants are simply the corporate embodiment of the policies and decision of Alfred H. Mayer individually. The necessary loans and financing to Alfred H. Mayer Company for its use in the purchase of land, building material, labor, and in paying other expenses pursuant to building and sale of houses in said subdivision are provided by Mercantile Mortgage Company pursuant to agreement with the defendant; and said Mercantile Mortgage Company has been made the exclusive source of financing for the purchasers of said homes. Paddock Woods is a subdivision located in St. Louis County, which at the present time is being developed by Defendants in the manner outlined above.

6. In February, 1965, Plaintiffs, because they determined their present home to be inadequate and unsatisfactory to their needs and desires, began to look for a

new home. Plaintiffs found many attractive new homes for sale, but solely because of Plaintiff Joseph Lee Jones' race, Plaintiffs were avoided, deceived, and delayed by developers and their agents in this community, including Defendants and their agents. On Tuesday, June 8, 1965, the Plaintiffs, proceeding on the basis of information published in an advertisement found in the St. Louis Post-Dispatch of Sunday, June 6, 1965 (a daily newspaper, circulated in interstate commerce and receiving news and advertising directly and indirectly from outside the State of Missouri where said newspaper is published), went to a development known as Paddock Woods, which was held out to be opened by the Defendant Alfred H. Mayer Company, Defendant Alfred Realty Company, and Defendant Alfred H. Mayer to the public for inspection in order to sell houses and lots. Plaintiffs proceeded to the site of said development at 6700 Parker Road and inspected from the outside the display homes constructed there. Plaintiffs then entered the office maintained by Defendants Alfred H. Mayer Company, Alfred Realty Company, and Alfred H. Mayer within one of the display homes, intending to inquire further. Upon entering the office Plaintiffs were avoided by the salesmen and agents of Defendants, who conducted themselves in a manner indicating that they did not wish to do business with the Plaintiffs. After picking up a brochure describing said development, Plaintiffs proceeded to inspect the inside of the several display homes of different styles on the site. Plaintiffs determined that the houses in said development were well constructed and designed, and that one style of house particularly suited Plaintiffs' needs and resources, and was reasonably accessible to their places of employment with the Veteran's Administration. Plaintiffs, therefore, returned to the said office in order to obtain more information and offer to purchase such a home. They there approached one of Defendants' sales-

men and agents who said: "Before we go any further, we do not take earnest money from Negroes." Plaintiff, Barbara Jo Jones, inquired why not, and was told by said agent in reply, "At least not until the market opens up." This ended the negotiations in which the agents of Defendants were willing to engage. The Defendants refused to consider Plaintiffs' application to purchase a house and to enter into a contract for the sale of a house and lot, because Joseph Lee Jones is a Negro, and it is Defendants' general policy not to sell said houses and lots to Negroes.

7. The Plaintiffs' right to obtain housing without discrimination based on race has been and continues to be violated by the conduct of Defendants in that:

(a) Defendants Alfred H. Mayer Company, Alfred Realty Company, and Mercantile Mortgage Company are corporations granted the legal privilege of operating in corporate form without personal liability on the part of their principals by the State of Missouri.

(b) Defendants are licensed to participate in their respective businesses by the State of Missouri through its Real Estate Commission and Defendants made use of the services of numerous other businesses licensed and regulated by the State of Missouri, such as plumbers, electricians, banks, lending institution, etc.

(c) Defendants are protected in their operations by various state laws and local ordinances, in particular zoning codes, building codes, banking and lending laws, and numerous laws effecting the transfer and development of real property.

(d) The State of Missouri, its political subdivision, and other administrative agencies contribute to the conduct of Defendants' businesses in many ways including the following:

(1) The Building Commissioner of St. Louis County must approve the plans of Defendants and cooperate with Defendants in order to accomplish the building of homes in said subdivision.

(2) The Metropolitan St. Louis Sewer District has furnished and will furnish sewer services to the said subdivision.

(3) The Planning Commission of St. Louis County and the St. Louis County Council are responsible for the zoning of the land in said subdivision and the enactment of an overall plan for use of land which will assure that this subdivision will retain its value as a successful residential area.

(4) All transfers of property in said subdivision, as well as its trust indenture embodying restrictions on use of said subdivision are presently or will be recorded in the Office of the Recorder of Deeds of St. Louis County.

(5) Numerous other offices, such as the traffic department, highway department, county engineer, etc., are available and contribute the time and resources of the County of St. Louis and State of Missouri to the success of the Defendants' venture.

(6) Education for the children of families living in said subdivision is provided by a school district which receives assistance and funds from the State of Missouri and from the taxpayers of said County and State.

(e) Defendants are aided in the sale of homes in said subdivision by Union Electric Company a licensed utility of the State of Missouri, which said corporation not only supplies electricity and electrical equipment to the homes in said subdivision, but further certifies the homes as "Medalion Homes", which endorsement is carried on the promotional material of Defendants Alfred H. Mayer Company, Alfred Realty Company, and Alfred H. Mayer

and allows the Defendants to profit from the extensive advertising of said "Medalion Homes" by said electric company. Defendants also receive the benefit of services of the Laclede Gas Company, another licensed utility of the State of Missouri subject to regulation by the Public Service Commission.

The State of Missouri and its political subdivisions have become involved in the success of the development of Paddock Woods in all the significant activities set forth above and in paragraph eight below. The State of Missouri did not intend and cannot lawfully countenance the use of its said facilities and laws for the benefit of a restricted portion of the population: and having obtained such numerous benefits from the State of Missouri upon the valid basis that this subdivision would in turn benefit the State of Missouri, Defendants are obliged under law to make the homes in said subdivision available to all citizens and residents of the State on an equal basis without discrimination based on race.

8. Defendants Alfred H. Mayer Company, Alfred Realty Company and Alfred H. Mayer build not just houses for sale but communities as well. The development of Paddock Woods is a complete and well planned municipal subdivision of the State of Missouri. This community is enlarged by said Defendants' other nearby developments: Paddock Estates, Paddock Meadows, and Wedgewood, all of which are financed by loans insured by the Federal Housing Administration, so that Paddock Woods is a part of a community provided, at least in part by loans insured by the credit of the Federal Government. Everything needed for a residential community is provided in Paddock Woods and all of it is provided by Defendants. Paddock Woods includes over One Hundred (100) projected homes and the opening, within one (1) year, of more plats in this subdivision is planned. The ulti-

mate result will be a small suburban community of approximately One Thousand (1000) people—living in an area chosen by Defendants for development, residing in homes designed and built by Defendants, driving on streets built by Defendants, playing golf on the nearby eighteen (18) hole course built by Defendants for the convenience of residents of the above subdivisions, and enjoying the facilities of the nearby bath and tennis club which Defendants plan to open on May 31, 1966, for the exclusive use of residents of Paddock Woods. Taking into account all the subdivisions mentioned above; this community will comprise some Twenty-Seven Hundred (2700) families. The streets of Paddock Woods are at this time being built by Defendant Alfred H. Mayer Company, on land owned by the said Defendant, and title to said streets will be maintained by Defendant until such time as a Board of Trustees is formed by Defendant to take over this function. Defendant Paddock Country Club, Inc., was incorporated and is controlled by Defendants Alfred H. Mayer Company, Alfred Realty Company, and Alfred H. Mayer for the primary use and benefit of the people in this said community; the bath and tennis club, which is widely advertised by Defendants as an inducement to the sale of said houses, is to be incorporated and controlled by Defendants for the benefit of the home owners in this subdivision, and the exclusion of Negroes from said subdivision, from the golf course operated by said Paddock Country Club, Inc., and from said bath and tennis club is a violation of Plaintiffs' rights under the Civil Rights Act of 1964 (42 U. S. C. 2000 d), as well as the State law of Missouri. Community services such as refuse collection will be performed by or for the Defendant Alfred H. Mayer Company for the benefit of the residents of Paddock Woods. Defendants Alfred H. Mayer Company, Alfred Realty Company and Alfred H. Mayer have prepared or shall prepare a deed embodying certain

restrictions on the use of the property sold to individual buyers in said subdivision and on that land which is common to all residents and have the same recorded along with the deeds delivered to those buying homes, and an association of the residents will be formed which will have the power to enforce these restrictions against owners of homes within the subdivision, through judicial recourse, if necessary, which power is the equivalent of the power to design and enforce zoning ordinances and the power to function as municipal government generally. Community facilities and services will be provided and performed under the direction of a Board of Trustees appointed by the Defendant Alfred H. Mayer, which will be granted the power to levy assessments, and to collect these assessments through judicial action in case of default, including the establishment of liens on properties located in said subdivision and to make contracts for the performances of the services for the benefit of Paddock Woods residents, which powers are equivalent to the function of a municipal government. Since these facilities are built and maintained primarily to benefit the public and since the Defendants plan to operate them as would a governmental body for the benefit of the residents, the Defendants' conduct is subject to state regulation, and is in fact an extension or subdivision of the state's authority.

Citizens living in this community are being denied their rights under the 1st and 14th Amendments to the Constitution of the United States to freely associate with whom ever they please. Those residents who would wish to live in an integrated community and have the experience of living with Negroes and providing their children with opportunity to meet and know, and go to school with Negro children during their formative years are denied this right of freedom of association. In the same manner the Defendants are denying the Plaintiffs the opportunity to

associate with white neighbors, and instead enforcing their residence in an all Negro area.

9. Plaintiffs desire to purchase and have selected from the various models and styles of homes offered by Defendants for sale in said Paddock Woods a "Hyde Park" model, three bedroom, "contemporary" style home, with two (2) car, rear-entry garage, all brick finish, intercom system, fully paneled family room and optional fireplace facing, which home according to the promotion material of Defendants Alfred H. Mayer, Alfred H. Mayer Company, and Alfred Realty Company can be built and sold to purchasers for a total price of \$28,195.00; Plaintiffs have further selected Lot No. 7147 as their first choice of the lots available in said subdivision, but Plaintiffs are willing to choose another lot if said lot has been taken by another purchaser before relief can be granted.

10. As a result of the matters alleged hereinabove, Plaintiffs have suffered actual damages in the amount of \$50.00 and irreparable harm by way of humiliation and deprivation of rights granted them by the laws, statutes, and Constitution of the United States of America. Plaintiffs have no adequate remedy at law, and in order to grant Plaintiffs full and adequate relief it is necessary that this Court order Defendants to sell to Plaintiffs a home of the type set forth above for cash or on such other reasonable financing terms as may be in accordance with normal practices involved in the sale of houses in Paddock Woods, and it is also necessary to enjoin the said Defendants from disposing of the lot of Plaintiffs' choice pending this litigation, because unless such injunction is ordered, there may be no lots available by the time this litigation has terminated.

11. The acts of Defendants set forth above were intentional, willful, and malicious, constituting a deliberate deprivation of Plaintiffs' rights, for which Plaintiffs are

entitled to recover punitive damages in the amount of \$10,000.00.

12. Wherefore, Plaintiffs pray this Court for a preliminary injunction enjoining the Defendants Alfred H. Mayer Company, Alfred Realty Company, and Alfred H. Mayer and their agents, servants, employees, attorneys, and all persons in active concert and participation with them, pending the final hearing and determination of this action, from failing to reserve Lot No. 7147 in the Paddock Woods subdivision of, or if said lot has been sold, some other lot in said subdivision sufficient to accommodate the home selected by Plaintiffs as alleged above. Plaintiffs further pray this Court for a permanent injunction enjoining the Defendants, their agents, servants, employees, attorneys, and all other persons in active concert and participation with them from failing to sell Plaintiffs said home and lot selected by Plaintiffs and from failing to construct said home diligently and carefully in accord with normal practice in Paddock Woods, and from discriminating in the future on the basis of race, color, creed, religion, or national origin in the sale of homes in the Paddock Woods subdivision, and for an order requiring the Defendants to sell Plaintiffs such a house and lot in accordance with Defendants' normal practice. Plaintiffs further pray for a judgment for damages against Defendants in the sum of \$50.00 plus punitive damages of \$10,000.00 and for such further relief as may to this Court seem fit and proper.

Samuel H. Liberman, II,
Attorney for Plaintiffs,
722 Chestnut Street,
St. Louis, Missouri 63101
CHestnut 1-8250.

**MOTION TO DISMISS FIRST
AMENDED COMPLAINT.**

(Filed in U. S. District Court Oct. 18, 1965.)

Defendants move the Court to dismiss this action because the First Amended Complaint fails to state a claim against Defendants upon which relief can be granted.

Israel Treiman,
Shifrin, Treiman, Agatstein &
Schermer,
Attorneys for Defendants,
611 Olive Street,
St. Louis, Missouri 63101,
CHestnpt 1-2140.

Copy of the foregoing Motion served upon Plaintiffs by mailing same to Mr. Samuel H. Liberman, II, Attorney for Plaintiffs, 722 Chestnut Street, St. Louis, Missouri 63101, this * * * day of December, 1965.

Israel Treiman,

ORDER.

(Filed in U. S. District Court May 18, 1966.)

This matter is before the Court on defendants' motion to dismiss plaintiffs' first amended complaint.

The Court having this date sustained defendants' motion to dismiss plaintiffs' first amended complaint It Is Hereby Ordered that said first amended complaint be and it is hereby dismissed.

Dated this 18th day of May, 1966.

/s/ John K. Regan,
United States District Judge.

**MEMORANDUM OPINION OF UNITED STATES
DISTRICT COURT.**

(Filed in U. S. District Court May 18, 1966.)

This matter is before the Court on defendants' motion to dismiss plaintiffs' first amended complaint. The action was brought by Joseph Lee Jones, a Negro, and his wife, both of whom are employed by the Veterans Administration, an agency of the United States Government. The injury alleged is the refusal of defendants to sell a house and lot to plaintiffs solely because of Jones' race, in alleged violation of plaintiffs' rights under Sections 1981, 1982, 1983 and 2000, Title 42, U. S. C., Executive Order No. 11063, providing for Equal Opportunity in Housing, the Thirteenth, and Fourteenth Amendments to the Constitution of the United States, Article I, Section 8, Clause 18, and Article VI of the Constitution of the United States. Plaintiffs assert jurisdiction in this court pursuant to Section 1983, 42 U. S. C., and Sections 1331, 1337 and 1343, Title 28, U. S. C.

For the purpose of the motion to dismiss, we take as true the facts well pleaded in the complaint. *Bonnot v. C. I. O. Local No. 14*, 8 Cir., 331 F. 2d 355.

Defendant, Alfred H. Mayer Company, a Missouri corporation, is engaged in the business of developing subdivisions, that is, buying and holding parcels of land in St. Louis County, Missouri, and building homes on this land to be resold to the public. Defendant, Alfred Realty Company, a Missouri corporation, is a real estate dealer which acts as the exclusive sales agent of the houses built by Alfred H. Mayer Company. Defendant Alfred H. Mayer owns a controlling interest in both corporations and is their managing officer. Defendant, Paddock Country Club, Inc., a Missouri corporation, is controlled by the

other defendants "for the primary use and benefit of the people who will reside in the subdivision."

Defendants are alleged to be presently developing a subdivision in St. Louis County known as Paddock Woods. After plaintiffs inspected a display house on the site and determined that one style of home particularly suited their needs and was reasonably accessible to their places of employment, they sought to obtain additional information from defendants and offer to purchase such a home. Plaintiffs allege that they desire to purchase a Hyde-Park model home, which, according to defendants' promotion material, can be built and sold to purchasers for a total of \$28,195, presumably inclusive of the lot in the subdivision on which the plaintiffs desired the home to be built. However, defendants, through their agents, informed plaintiff of defendants' "general policy not to sell houses and lots to Negroes," and in effect "refused to consider plaintiffs' application to purchase a house and enter into a contract for the sale of a house and lot."

A substantial portion of the complaint is devoted to allegations concerning defendants' plans and intentions relating to the future development of Paddock Woods. Thus, it is alleged that Paddock Woods includes over 100 "projected" homes, that the opening of more plats in the subdivision is planned, that streets in the subdivision are presently being built by Alfred H. Mayer & Company on land it owns (title to which will ultimately be transferred to a board of trustees to be formed by it), so that the "ultimate result" will be a suburban community of approximately 1,000 people "living in an area chosen by defendants for development, residing in homes designed and built by defendants, driving on streets build (sic) by defendant's, playing golf on the nearby eighteen (18) hole golf course built by defendants for the convenience of residents (of this and other nearby subdivisions developed by defendants), and enjoying facilities of the nearby bath

and tennis club which defendants plan to open for the exclusive use of the residents of Paddock Woods.”

For the purpose of the motion to dismiss, we assume that but for the color of Mr. Jones’ skin, defendants would have sold to plaintiffs the lot they desire and would have built for them thereon the style of home they selected.

Plaintiffs do not contend that every person who offers a home for sale has no right to refuse to sell his property on racially discriminatory grounds. The thrust of their complaint is that the developer of a private subdivision is in a different category, apparently because his activities are business in nature. In their brief filed in opposition to the motion to dismiss, plaintiffs state their theory thusly: “The basis of the cause of action set forth in Plaintiffs’ First Amended Complaint is that Defendants are prevented by federal law from discriminating on the basis of race in refusing to sell lots and houses to Negroes in the subdivision they are building in St. Louis County.” Stated otherwise, the issue is whether the willful refusal of an owner of private property who is developing a private subdivision thereon to sell a part of his property to a Negro solely because of race entitles the person so discriminated against, under any presently applicable federal law, either to damages or to a mandatory injunction or both. Under the present state of the law, our answer must be in the negative.

The language of Sections 1981 and 1982, reciting certain rights of citizens of the United States (e. g. to purchase, sell, hold and convey real and personal property and to make and enforce contracts) is broad and general. The legal right to purchase property does not, however, carry with it a corresponding obligation on the part of the owner to enter into a contract of sale against his will.

It is now well settled that these civil rights statutes are directed toward governmental action. *Hurd v. Hodge*,

334 U. S. 24; *Buchanan v. Warley*, 245 U. S. 60. In *Buchanan*, it was said (245 U. S., l. c. 79), "The Fourteenth Amendment and these statutes enacted in furtherance of its purpose operate to *qualify* and entitle a colored man to acquire property without state legislation discriminating against him solely because of color." A long line of cases makes it clear that Section 1983 (which alone of the civil rights statutes, other than the Civil Rights Act of 1964, provides for a right of action) may be resorted to only in situations where *state action* is involved. It is true, of course, that the concept of "state action" has been greatly expanded since the early *Civil Rights Cases*, 109 U. S. 3, and that it is not limited to state legislation, but state action in some form there must be. And it is equally true that "[w]hat is 'private' action and what is 'state' action is not always easy to determine." *Evans v. Newton*, 382 U. S. 296, 299.

Mr. Justice Frankfurter in his concurring opinion in *Terry v. Adams*, 345 U. S. 461, 472, stated the concept in this fashion, "The vital requirement is State responsibility—that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme by which colored citizens are denied (civil) rights merely because they are colored."

Even Mr. Justice Douglas, from whose concurring opinions plaintiffs quote at length, is committed to the view that "The Fourteenth Amendment protects the individual against *state action*, not against wrongs done by individuals." *United States v. Williams*, 341 U. S. 70, at 92. And as recently as March 28, 1966, in *United States v. Guest*, the Supreme Court stated that such "has been the view of the Court from the beginning" and "it remains the Court's view today." See also *United States v. Price*, decided the same day as *Guest*.

Plaintiffs' protestations to the contrary, there must be some substantial involvement of the state or one acting

under the color of its authority, even though such involvement of the state need not be either exclusive or direct. Involvement, however, there must be. See *Wallach v. Cannon*, 8 Cir., 357 F. 2d 557, 561-562.

We have carefully read all of the forty or more cases cited by plaintiffs in support of their contention that they have a right of action against defendants under the existing civil rights statutes and the federal constitution. We find all such cases clearly distinguishable.

Shelley v. Kraemer, 334 U. S. 1, involved an effort to judicially enforce in state courts restrictive covenants which operated to prevent the occupancy and purchase of real property by Negroes. The restrictive covenants were contained in private contracts between private persons. The Supreme Court stated, "It cannot be doubted that among the civil rights intended to be protected from discriminatory *state action* by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property."

In *Shelley*, as in the other cases to which we have been cited, the key words are "state action." The court found the requisite state action in the *participation of the state courts in the enforcement* of the restrictive covenants. Said the court, 334 U. S., l. c. 19, "The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. *The owners of the properties were willing sellers; and contracts of sale were accordingly consummated.* It is clear that but for the *active* intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint" (Emphasis supplied).

In the instant case, not only were no contracts of sale consummated, but on the contrary the owners of the property are *unwilling* to sell at all to plaintiffs. No state ac-

tion has been exerted in favor of defendants. Defendants are not seeking the aid or intervention of the courts to prevent plaintiffs from acquiring the property. To the contrary, it is plaintiffs who ask this court to compel defendants to dispose of their property against their will.

Parenthetically, we note that although there is no intimation in *Shelley* that the contracts in question were invalid even though unenforceable,¹ the present case does not involve any restrictive covenants or agreements between defendants and the ultimate purchasers of property in the subdivision *prohibiting* the sale of the property therein to Negroes. What we have presently before us is simply the initial refusal of the present owner of the property to sell his own property to a Negro. Cf. *Corrigan v. Buckley*, 271 U. S. 323, 330, holding that “[t]he prohibitions of the Fourteenth Amendment ‘have reference to state action exclusively, and not to any action of private individuals’ . . . ‘Individual invasion of individual rights is not the subject matter of the Amendment.’ Civil Rights Cases, 109 U. S. 3, 11.” The court further stated (271 U. S., l. c. 331) that “it is obvious that while they (present sections 1981, 1982 and 1983, Title 42, U. S. C.) provide, *inter alia*, that all persons and citizens shall have equal right with white citizens to make contracts and acquire property, they like the Constitutional Amendment under whose sanction they were enacted, do not in any manner prohibit or invalidate contracts entered into by private individuals in respect to the control and disposition of their own property.” It would appear, a fortiori (sic), therefore, that these statutes do not compel an owner of private

¹ The reverse is true, “We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are, effectuated by voluntary adherence to their terms it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated.” (334 U. S., l. c. 13.)

property to sell such property to any other person against his will, whatever the reason may be for his refusal.

Hampton v. City of Jacksonville, Florida, 5 Cir., 304 F. 2d 320, involved two golf courses which the city had owned and operated for its residents. After an injunction prevented the city from operating these golf courses on a racially segregated basis, they were sold to private persons (on very favorable terms to the purchasers), each conveyance containing a reversionary clause ensuring that the property would *continue* to be used for the purpose of a golf course. The purchasers in each instance restricted the use of the golf courses to white persons only. An action was then brought to enjoin such restrictive operation.

In the court's view, the absolute obligation of the new owners of the property that they immediately, presently and always use the property for golf course purposes and no other, constituted "complete present control" by the City, and that the reservation of control in the reversionary clause involved the City "to the extent necessary to constitute such operation 'state action.'" Said the court, "So, too, where the City of Jacksonville, which has long been in the *business of operating golf courses for its residents*, elects to sell the golf courses, but *only* on condition that they *continue* to be used in such manner that the *public* will still enjoy their benefits in the *same* capacity, the city is permitting the private individual to perform this part of the *City's* function." The court rejected the argument that unlike a lease the case involved simply the sale of city property. Answering this argument the court said (304 F. 2d, l. c. 322), "Conceptually, it is extremely difficult, if not impossible, to find any rational basis of distinguishing the power or degree of control, so far as relates to the state's involvement, between a long-term lease for a *particular purpose* with the right of cancella-

tion of the lease if that purpose is not carried out on the one hand, and an absolute conveyance of property, subject, however, to the right of reversion if the property does not continue to be used for the purpose prescribed by the state in its deed of sale."

Among the lease cases are *Derrington v. Plummer*, 5 Cir., 240 F. 2d 922; *Department of Conservation and Development v. Tate*, 4 Cir., 231 F. 2d 615, and *Burton v. Wilmington Parking Authority*, 365 U. S. 715. In *Derrington*, the County constructed a new courthouse in which part of the basement was finished and equipped for use as a cafeteria. The cafeteria space was leased to Derrington to furnish cafeteria service for the benefit of persons having occasion to be in the County Courthouse. That is, the County undertook to furnish eating facilities to all persons without regard to race. Derrington refused to serve Negroes. The court held that under the facts the action of the lessee "may well be said to be conduct of the County and thus 'state action' within the inhibition of the Fourteenth Amendment." The court noted that the courthouse had just been built with public funds for use by citizens generally, and this part of the basement had been planned, equipped and furnished by the County for use as a cafeteria. It was held that since the express purpose of the lease was to furnish services to people in the courthouse, it followed that "in rendering such services the lessee stands in the place of the County," so that the lessee's "conduct is as much state action as would be the conduct of the County itself." Here, too, we see *direct* involvement by the County in a meaningful manner, in the use of public property, as contrasted to the entire want of any comparable involvement in the instant case as well as the completely private nature of defendants' property.

Roman v. Birmingham Bus Company, 5 Cir., 280 F. 2d 531, invalidated a local bus company's rule requiring sepa-

rate seating of Negroes and white. A city ordinance expressly requiring separate seating was repealed, and at the same time a new ordinance was enacted authorizing the transit company to adopt seating rules and regulations and making the violation of such rules a criminal offense. The court found the requisite "state action", holding, "Where, as here, the City *delegated* to its *franchise* holder the power to make rules for seating of passengers and made the violation of such rules criminal, . . . we conclude that the Bus Company *to that extent* became an agent of the State and its actions in promulgating and enforcing the rule constituted a denial of the (individual's) constitutional rights."

The Court pointed out that the right to use the *public streets* for hire is a special privilege, and that the issuance of a franchise to operate a bus line for transportation of passengers for hire is a governmental function. Said the court, "[T]he justification for the grant by a state to a private corporation of a right or franchise to perform such a public utility service as furnishing transportation, gas, electricity, or the like, *on the public streets of the city*, is that the grantee is about the public's business. It is doing something the state deems useful for the public necessity or convenience. *This is what differentiates the public utility which holds what may be called a 'special franchise,' from an ordinary business corporation which in common with all others is granted the privilege of operating on corporate form but does not have that special franchise of using state property for private gain to perform a public function.*" (Emphasis supplied.) In the instant case, defendants are not performing a public utility service, do not have a special franchise, and make no use of public property in the conduct of their business.

A leading Supreme Court case on the subject of state action is *Burton v. Wilmington Parking Authority*, 365 U. S. 715. In that case, the court stated the applicable

standard of interpretation of the Fourteenth Amendment as follows: "Private conduct abridging individual rights does no violence to the Equal Protection Clause *unless to some significant extent* the State in any of its manifestations has been found to have become involved in it." (Emphasis supplied.) The court carefully refrained from any attempt to fashion and apply a precise formula for recognition of state responsibility, stating this was an "impossible task". It was held that whether the state is sufficiently involved in private conduct can only be determined in each case by sifting facts and weighing the circumstances there presented.

In *Burton*, an automobile parking building had been constructed with *public* funds for *public* purposes and operated by a *state* agency. A restaurant which was physically and financially a part of this public building, but operated by a private person under lease, refused to serve a Negro. The court held that in view of all of the circumstances, the State must be considered as a joint participant in the operation of the restaurant and that the challenged conduct could not reasonably be considered to be "purely private", so as to fall without the scope of the Fourteenth Amendment. Said the court (365 U. S., l. c. 726), "Specifically defining the limits of our inquiry, what we hold today is that when a State leases public property *in the manner and for the purpose shown* to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself."

In *Simkins v. Moses H. Cone Memorial Hospital*, 323 F. 2d 959, the issue presented was whether the activities of the hospital which participated in the Hill-Burton program ("with its massive financial aid and comprehensive plans") were sufficiently imbued with "state action" to

bring them within the Constitutional prohibition against racial discrimination. That is, the question for determination was whether the state or federal government or both became so involved in the conduct of this otherwise private body that its activities were also the activities of these governments. The court answered this question in the affirmative, holding that it was controlled by *Burton*. Just as the Supreme Court in *Burton* "attached major significance to 'the obvious' fact that the restaurant is operated as an integral part of a public building devoted to a public parking service", the court in *Simkins* found it significant "that the defendant hospitals operate as integral parts of comprehensive joint or intermeshing state and federal plans or programs designed to effect a proper allocation of available medical and hospital resources for the best possible promotion and maintenance of public health. Such involvement is discriminatory action 'it was the design of the Fourteenth Amendment to condemn.'" 323 F. 2d 1. c. 967. Discussing the Hill-Burton Act, the court found a congressional design therein to induce the States to undertake the supervision of the construction and maintenance of adequate hospital facilities throughout their territory rather than an intent simply to grant financial aid to individual hospitals. In this situation it was said, "*Upon joining the program* a participating State in effect assumes, as a State function, the obligation of planning for adequate hospital care. And it is, of course, clear that when a State function or responsibility is being exercised, it matters not for Fourteenth Amendment purposes that the [institution actually chosen] would otherwise be private; the equal protection guarantee applies."

Smith v. Holiday Inns of America, Inc., 6 Cir., 336 F. 2d 630, applying the law as it existed prior to the Civil Rights Act of 1964 (which "would plainly render defendants' policy of racial discrimination illegal"), held that

the Fourteenth Amendment prohibited motel operators from refusing to accept Negroes as guests at a motel erected on land purchased in a city redevelopment project from the city housing authority. The court stated, "The single pervasive fact which defendants seek to ignore but which this court cannot is that this motel is part and parcel of a large, significant, and continuing *public* enterprise—the Capitol Hill Redevelopment Project." The court held that it was apparent that *public funds* of the city, state and federal government "were inextricably intermingled in the financing of the Capitol Hill Redevelopment Project. It is also obvious that the project was carried out by public agencies created by and operating under the laws of the United States and the State of Tennessee." Even though the fee was actually transferred (as distinguished from *Burton* which involved a lease), the court emphasized that in both cases "the basic plan, the financing, the land acquisition, the execution of the plan, the continuing supervision of the plan are all state actions under state law and through state agencies" (336 F. 2d, l. c. 635). The major factors in the decision were "The public design, and the continuing public controls over the project, as well as "the fact that part of the preconceived public design was to create a facility (a motel) which has service to the general public as its basic purpose." Holding that "the right not to have state finances, state agencies and state laws employed (for the purpose of banning some of the State's own citizens solely on the grounds of race) is a right encompassed in the Equal Protection Clause of the Fourteenth Amendment", the court ruled that the discrimination practiced by the defendants was not purely private in character and was the product of state action. In the instant case, the subdivision is not part of a redevelopment project or other public enterprise or program, and no public funds are used to finance or aid the development. To the contrary, the project, in all its aspects, is purely private.

Plaintiffs also cite the cases involving voting rights in which the Supreme Court ruled against primary elections held by a political party which barred Negroes from participation. Aside from the fact that essentially these cases pertain to Fifteenth Amendment rights, we find them wholly inapplicable to the instant situation. The first of these cases, *Nixon v. Herndon*, 273 U. S. 536, invalidated a Texas statute which barred the right of Negroes to vote in primary elections. *Smith v. Allwright*, 321 U. S. 649, again invalidated Texas all-white primary elections on the ground that "state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function." It was held that the state could not avoid its duties by so setting up its electoral process that a private organization controlling a primary was permitted to practice racial discrimination.

Smith was implemented by *Rice v. Elmore*, 4 Cir., 165 F. 2d 387, which held that even though all state laws provided for primary elections were repealed, nevertheless the action of the State in permitting a party to take over part of the election machinery could not operate to avoid the provisions of the Constitution forbidding racial discrimination in the elections which were clearly a state function.

And in *Terry v. Adams*, 345 U. S. 461, the Supreme Court held that the activities of the Jaybird Democratic Association "played a sufficient part" in the Democratic primary elections as to make its denial of the right of Negroes to vote in the Jaybird primaries a denial of effective participation in the elective process in selecting the officials in the County concerned and thereby deprived citizens of voting rights because of their color in violation of the Fifteenth Amendment.

In these election cases what is held is that private groups are subject to constitutional restraints "when they

perform functions of a *governmental* character in matters of great public interest." In *Nixon v. Condon*, 286 U. S. 73, 88, it was pointed out that the defendants were "acting in matters of high public interest, matters *intimately connected with the capacity of government to exercise its functions.*" "That is to say, when private individuals or groups are *endowed* by the State with powers or functions *governmental* in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." *Evans v. Newton*, *supra* (382 U. S. 1. c. 299). We find no similar situation existent under the facts alleged in the complaint. No governmental power or functions are involved in the sale of private property, a lot in a private subdivision.

Another line of cases cited by plaintiffs deal with the utilization of trespass laws to enforce a state's policy of racial segregation. No doubt these cases are cited because in at least some of them the Supreme Court has discussed limitations upon the rights of owners of private property. Our study of these cases has convinced us not only that they fail to support plaintiffs' position, but also that much of the discussion therein by the Justices of the Court would lead to the opposite conclusion. We briefly refer to some of these cases.

Lombard v. Louisiana, 373 U. S. 267, simply held that where public officials had, in effect, determined that they would not permit Negroes to seek desegregated services in restaurants, the Court would not sustain the conviction of persons who refused to leave a restaurant in which they were denied service because of race. Plaintiffs' main reliance is on the concurring opinion of Mr. Justice Douglas. However, what he primarily stressed was the fact that the penalty was imposed upon the defendants by the state judiciary and that *such* action was necessarily "state action". Thus, "By *enforcing* this criminal mischief stat-

ute, invoked in the manner now before us, the Louisiana courts are denying some people access to the mainstream of our highly interdependent life solely because of their race." 373 U. S., l. c. 279.

Plaintiffs' brief quotes extensively from the concurring opinion of Mr. Justice Douglas in *Lombard*. However, in their zeal to promote their own ends, plaintiffs have tailored his language in at least one instance by omitting an essential portion of the sentence quoted, so that the part quoted in their brief not only fails to fairly represent the thinking of Mr. Justice Douglas, but on the contrary has the effect of actually misrepresenting what he said. The complete sentence to which we refer is as follows: "But surely *Shelley v. Kraemer, supra*, and *Barrows v. Jackson, supra*, show that the day has passed when an innkeeper, carrier, housing developer, or retailer can draw a racial line, refuse service to some on account of color and obtain the aid of a State *in enforcing his personal bias by sending outlawed customers to prison or exacting fines from them.*" 373 U. S., l. c. 280. Plaintiffs omitted the portion we have italicized.

Plaintiffs are fully aware that this case does not involve an attempt by a "housing developer" to send his "outlawed customers" to jail or otherwise punish them with the help of the state. We seriously doubt whether Mr. Justice Douglas' reference to "housing developer" (which plaintiffs emphasize) has to do with a private subdivision developer, as distinguished from a *public* redevelopment project. In any event, nothing in the concurring opinion (which of course is no more than the expression of the views of one Justice) reasonably supports the position taken by plaintiffs.

Peterson v. City of Greenville, 373 U. S. 244, is another sit-in demonstration case which involved the convictions under a state trespass statute of demonstrators who re-

fused to leave the lunch counter areas after being denied service. State action was found in the fact that the City ordinance *required* segregated service and in the use of the state's criminal process to *enforce* such discrimination.

Bell v. Maryland, 378 U. S. 226, is a recent sit-in demonstration case which gave rise to extensive discussion by various members of the Supreme Court. The demonstrators were convicted under Maryland trespass laws after refusing to leave a Baltimore restaurant. The majority of the court did not reach the merits of the case, remanding it to the State court for consideration of whether the convictions should be nullified in view of a superseding change in state law. In the concurring opinion of Mr. Justice Douglas, he pointed out that "We deal here with *public accommodations*—with the right of people to eat and travel as they like and to use facilities whose only claim to existence is *serving the public*" (373 U. S., l. c. 247). Again, Mr. Justice Douglas stressed that there was present in that case state *judicial* action (*enforcement* of trespass statutes which is clearly state action, citing *Shelley v. Kraemer*, 334 U. S. 1; 20). He noted that in *Shelley* there was no state statute which regulated the use of restrictive covenants either by expressly authorizing their use or administratively regulating the matter, so that "only the *courts* of the state were involved." Mr. Justice Douglas significantly added,

"At the time of the *Shelley* case there was to be sure a Congressional Civil Rights Act that guaranteed all citizens the same right to purchase and sell property 'as is enjoyed by white citizens' [334 U. S. at 11]. But the existence of that statutory right, like the existence of a right under the Constitution, is no criterion for determining what is or what is not 'state' action within the meaning of the Fourteenth Amendment. The conception of 'state action' has been con-

sidered in the light of the *degree* to which a state has *participated in depriving* a person of a right.”

In Mr. Justice Black’s dissenting opinion, he expressed the view that the *mere* enforcement of a trespass statute was not of itself sufficient “state action” within the meaning of the Fourteenth Amendment. He distinguished *Shelley v. Kraemer*, stating, “It seems pretty clear that the reason judicial involvement of the restrictive covenants in *Shelley* was deemed state action was not merely the fact that a state court had acted, but rather that it had acted ‘to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire *and which the grantors are willing to sell.*’ 334 U. S. at 19. In other words, this Court held that state *enforcement* of the covenants had the effect of denying to the parties their federally guaranteed right to own, occupy, enjoy and use *their* property without regard to race or color.” (Emphasis supplied.) Thus, the differences between Mr. Justice Douglas and Mr. Justice Black relate only to the *effect* and ultimate purpose of the judicial action taken in a particular case. Both are in essential agreement as to the *necessity* that the state courts *affirmatively* be involved in aiding those guilty of discriminatory practices where no state law or executive officers sanction such practices.

We believe Mr. Justice Black, although in dissent, fairly summarized the existing case law relating to property rights as follows:

“Thus, the line of cases from *Buchanan* through *Shelley* establishes these propositions: (1) When an owner of property is willing to sell and a would-be purchaser is willing to buy, then the Civil Rights Act of 1866, which gives all persons the same right to ‘inherit, purchase, lease, sell, hold, and convey’ property, *prohibits a State*, whether through its legislature,

executive, or judiciary, from preventing the sale on grounds of the race or color of one of the parties. *Shelley v. Kraemer*, supra, 334 U. S., at 19. (2) Once a person has become a property owner, then he acquires all the rights that go with ownership; 'the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land.' *Buchanan v. Warley*, supra, 245 U. S., at 74. This means that the property owner may, in the absence of a valid statute forbidding it, sell his property to whom he pleases and admit to that property whom he will; so long as both parties are willing parties, then the principles stated in *Buchanan* and *Shelley* protect this right. But equally, when one party is unwilling as when the property owner chooses not to sell to a particular person or not to admit that person, then, as this Court emphasized in *Buchanan*, he is entitled to rely on the guarantee of due process of law, that is, 'law of the land,' to protect his free use and enjoyment of property and to know that *only by valid legislation*, passed pursuant to some constitutional grant of power, can anyone disturb his free use" (378 U. S., 1. c. 330-331).

We examine the facts alleged in the first amended complaint for the purpose of determining whether under the authorities there is such involvement of the state as to constitute defendants' racially inspired refusal to sell their property to plaintiffs "state action".

We start with the admitted fact that the property involved is private property which belongs to defendants, or at least to one of them, and that plaintiffs have no property interest whatever therein. It is further incontrovertible, and the very basis of the action that defendants are unwilling to contract with or to convey any property interest to plaintiffs. This fact immediately distin-

guishes the case from *Shelley v. Kraemer*, and other similar cases, which involved the validity of agreements affecting the rights of a willing seller to deal with a willing buyer and to validly transfer an interest in property.

The property involved in this case was neither leased nor sold by the state or county to plaintiffs. Hence, the right to use public property or facilities is not involved. There is no claim that defendants have accepted any governmental appropriations in aid of their subdivision development. It is incontrovertible that the development is not part of a redevelopment project undertaken by governmental agencies or financed to any extent with public funds. These facts clearly distinguish this case from *Hampton, Derrington, Burton, Smith, Simpkins*, and similar authorities.

Significantly, plaintiffs have carefully refrained from alleging that the subdivision in which they seek to purchase a home is aided by any federally insured financing, and it is clearly implied from the complaint that both the subdivision in question as well as the defendant country club are and will be privately financed, and not involved in any form of federal aid or financial assistance. For such reason Executive Order No. 11063, to the extent it might otherwise be applicable, is without any meaningful significance. In attempting to evade this issue plaintiffs have alleged that *other* subdivisions which were promoted by defendants and which adjoin the subdivision in question have been financed by loans from the Federal Housing Association, and that the subdivision here in question is part of an overall "community" which has been provided by defendants, at least in part by loans insured by the credit of the federal government. However, what defendants may have done in promoting other subdivisions cannot add to plaintiffs' rights with respect to the subdivision here in question, and certainly not with respect to the specific house and lot therein they seek to purchase.

It is plaintiffs' theory as set forth in the complaint that defendants are not simply proposing to sell just a house, but rather "they are building a community" in which, so they claim, "the state is involved from beginning to end, including the licensing of the defendants to engage in business, the zoning of the property, the building and maintenance of streets, sewers, and other public facilities, the enforcement of covenants running with the land to control the continuing use, maintenance, and development of the project."

This "involvement" is set forth in meticulous detail in the complaint as follows: (1) The corporate defendants have been granted the "privilege" of operating in corporate form. So, too, are all other corporations chartered by the State of Missouri. (2) Defendants are licensed to engage in business and have made use of the services of numerous other businesses which are licensed and regulated by the state, such as plumbers, electricians, banks and the like. So, too, do many other private enterprises. The mere fact defendants are licensed by the state to carry on their occupations does not of itself involve the state in the operation of their business. In the words of Mr. Justice Black, dissenting in *Bell v. Maryland*, 378 U. S. 266, 333, "Businesses owned by private persons do not become agencies of the State because they are licensed; to hold that they do would be completely to negate all our private ownership concepts and practices." (3) Defendants are "protected" in their occupations by various state laws and local organizations, in particular zoning laws, banking and lending laws and numerous laws affecting the transfer and development of real property. Whatever this conclusionary allegation may mean, it is evident that the laws referred to are general in their application and confer no special privileges upon defendants. (4) In numerous ways, "the state with its political subdivisions and other administra-

tive agencies, 'contribute' to the conduct of defendants' businesses, including the following: the plans of defendants to accomplish the building of homes ~~must~~ be approved by the Building Commissioner, the Metropolitan Sewer District has furnished and will furnish sewer services to the subdivision, the responsibility for zoning and an overall land use plan is committed to the Planning Commission of St. Louis County and the St. Louis County Council, all transfers of property as well as trust indentures which will embody future restrictions on the use of the subdivision either are or will be recorded in the Office of the Recorder of Deeds, other offices such as the Traffic Department, Highway Department and County Engineer" are available and contribute the time and resources of the County of St. Louis and State of Missouri to the success of Defendants' venture, education for the children of families living in the subdivision are provided by a school district which receives assistance and funds from the State and the taxpayers of the County and State, the Union Electric Company, a licensed utility of the state supplies electricity and electrical equipment to homes in the subdivision, and in addition certifies the homes as "Medalion Homes" which permits the defendants to profit therefrom, and defendants also receive the benefits of services from Laclède Gas Company, another licensed utility company, subject to regulations by the State Public Service Commission.

We see no significant state involvement in any of the foregoing allegations, giving them the most liberal intendment. Public utilities must furnish services to all who qualify, and may not refuse service on the ground that the customer has discriminated against others. In *Hackley v. Art Builders, Inc.*, D. C. Md., 179 F. Supp. 851, 857, it was said, "Most apartment home owners and owners of private houses throughout the State receive water and sewage disposal service from public corporations. This does not

make such owners subject to the same rules as public corporations, or publicly controlled corporations." As to the allegations that the state is involved in the zoning and land use regulations, it is, of course, obvious that these regulations are *restrictions* upon defendants' right to use their land as they choose. Aside from being general in application, such regulations do not confer any rights upon the defendants by the state, but instead take away some of their rights in the exercise of the state's police powers.

The availability of educational facilities to families of purchasers of the property, as well as the availability of various state and county offices in no way involve the state in the conduct of defendants' business. These are facilities and rights available to all citizens without discrimination, and do not in any way aid or abet defendants in the conduct complained of.

Plaintiffs place great stress upon their conclusionary allegations that the subdivision development will be a "complete community", their theory being that it follows therefrom that all the conduct of defendants is comparable to a municipal corporation and subjects them to the same proscriptions as a true municipality. Thus, they urge that defendants intend to and will construct and maintain streets for use by the public in general, much as does a municipality, and that they intend to impose restrictive covenants in the deeds of conveyance which will authorize assessments for street maintenance, garbage collections, and other services similar to those provided by municipalities. Plaintiffs argue that defendants will thereby be invested with governmental powers. It is, of course, true that whenever private individuals are empowered to exercise governmental functions (as in the voting cases, *supra*), they are subject to the same constitutional and statutory limitations upon the exercise of *such powers* as the government itself. But the complaint herein does not touch

upon any conduct of defendants which could fairly be said to be an exercise of a *governmental* function.

Even if it be assumed (and no case so holds) that when a state "permits" (mainly in the sense it does not prohibit) a private person to build streets on his own property and to make contracts which authorize assessments against abutting owners for their maintenance, the private person is thereby carrying on a state function, it does not follow therefrom that the *sale* of his property also becomes a state function.

It may well be that once streets are built, parks set aside and garbage collection provided for by defendants, the residents of this subdivision will be entitled to utilize these services on a non-discriminatory basis. But this is not the question before us. However this question may be answered, plaintiffs have no present right to compel defendants to convey private property to them.

In stressing the fact the streets will be constructed by the defendants, the case of *Marsh v. Alabama*, 326 U. S. 50, is cited. *Marsh* involved the exercise of the right of free speech on a privately owned street in public use. The Supreme Court held that "[o]wnership (of property) does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of the persons using it."

Here, plaintiffs make no contention either that they are or will be barred from using the streets which defendants will build and maintain or which the trustees to be named in the future will maintain. Defendants have never sought in any way to limit plaintiffs' peaceful or constitutionally authorized activities on the privately owned streets or sidewalks of the subdivision. Yet, it is only the *streets* which are or will be opened by defendants for use by the public

in general. There is no reasonable basis for contending that the lots owned by defendants on which houses have been or will be constructed abutting the private streets are intended to be used by the public in general. To the contrary, although defendants do solicit the public through advertisements and otherwise in order to obtain purchasers therefor, and such purchasers will be members of the general public, nevertheless the house and lot in each instance is intended to be used only by the individual purchaser thereof.

In all the sit-in demonstration cases in which *Marsh* was either cited or followed, it is evident that the property the court had reference to (in connection with the alleged trespassing) was the property on which the businessman was conducting his business, the very property which he opened up to the public for use in connection with his business activities. It followed therefrom that the businessman did not necessarily have a right to the assistance of the state in evicting from his property a person who entered thereon as a member of the public seeking to obtain the very service which he provided therein.

There is no allegation in the first amended complaint that plaintiffs have been evicted from the place of business operated by defendants, nor that either of them was arrested, nor that the state in any way used its judicial branch for the purpose of aiding defendants in discriminating against them. The state has not intervened to assist defendants. When all is said and done, the complaint clearly demonstrates that defendants did no more than politely refuse to enter into a contract of sale with plaintiffs. The actions of defendants are neither required nor affirmatively sanctioned by the state. It has maintained a policy of strict neutrality. Even in the sit-in demonstrations there is no intimation that (prior to the Civil Rights Cases of 1964) the proprietors of the restaurants would

have been subject to a damage action for refusing to serve the demonstrators. All that the Supreme Court held in these cases is that the state could not aid or participate in such refusal. (Of course with the passage of the Civil Rights Act of 1964, the situation insofar as places of public accommodation are concerned has been changed.)

Taking as the crucial test of state action the *actuality of state involvement*, we find that under the facts well pleaded there has been no such involvement as to make the acts of the defendants herein state action. What we have here is individual action. Defendants are not here seeking judicial enforcement of any discriminatory restrictive covenant. If the defendants' refusal to sell their privately owned property to plaintiffs is violative of any right of plaintiffs, their remedy is not in this court. In the absence of federal legislation dealing with the problem, this court has no jurisdiction to redress plaintiffs' alleged grievances.

The Civil Rights Act of 1964 does not confer any right of action upon a person with whom a property owner refuses to contract for the sale of his property. *Heart of Atlanta Motel, Inc. v. United States*, 379 U. S. 241, sustained in 1964 Act on the "basis of the commerce clause." The court stated that the applicability of that Act "is carefully *limited* to enterprises having a substantial relation to the interstate flow of goods and people, except where state action is involved." Except in situations involving state action, the Civil Rights Act of 1964, insofar as here relevant, pertains to places of public accommodation. We note that Mr. Justice Black in his concurring opinion (379 U. S., 1: p. 278), referring to his dissenting opinion in *Bell*, *supra*, says that what he there stated was only that "the Fourteenth Amendment in and of itself, *without any implementation* by a law passed by Congress, does not bar racial discrimination in privately owned places of business in the absence of state action."

And Mr. Justice Douglas in his concurring opinion (379 U. S. 280) also referring to his concurring opinion in *Bell*, supra, states that his position is that "the right to be free of discriminatory treatment (based on race) in places of public accommodation—whether intrastate or interstate—is a right guaranteed against state action by the Fourteenth Amendment and that state enforcement of the kind of trespass laws which Maryland had in that case was state action within the meaning of the Amendment." He also called attention to the definition of "state action" in the Civil Rights Act of 1964, which defines it, inter alia, as discrimination "enforced by officers of the state."

Neither the Commerce Clause nor the nature of plaintiffs' employment confer upon them any additional rights to compel an unwilling seller to convey his property to them in the absence of a statute so requiring. *Atlanta Motel* would not have been decided as it was but for the explicit provisions of the Civil Rights Act of 1964. The determination of when and the circumstances under which interstate commerce is to be regulated is initially for the Congress, not the Courts. Unless and until Congress acts, there is no need (and indeed, no right) for us to determine whether a federal fair housing act would constitute a valid exercise of the right of Congress to regulate commerce between the states. It is sufficient, for present purposes, that such legislation has not been enacted.

Plaintiffs do not contend that the state has given any affirmative support whatever to defendants' racially discriminatory practices. The case presented is that of a property owner who has for reasons of his own declined to convey a part of his property to a person seeking such a conveyance.

Neither the fact that defendants own more than one parcel of property, nor the fact that the various parts of the property are being offered for sale to others as part

of an overall plan to which the State in any of its manifestations is not a party, does not alter the basic question we here answer in the negative, namely, Does this court have the power either to compel defendants to transfer title to their property against their will or be answerable for damages for their refusal to do so?

We hold that under present law, plaintiffs' first amended complaint fails to state a claim over which this court has jurisdiction. Defendants' motion to dismiss must be and is hereby sustained.

Dated this 18 day of May, 1966.

/s/ John K. Regan,
United States District Judge.

JUDGMENT.

United States Court of Appeals
For the Eighth Circuit.

No. 18,473. September Term, 1966.

Joseph Lee Jones and Barbara Jo Jones,

Appellants,

vs.

Alfred H. Mayer Company, a Corporation, Alfred Realty Company, a Corporation, Paddock Country Club, Inc., a Corporation, and Alfred H. Mayer, an Individual and an Officer of the Above Corporation.

• Appeal from the United States District Court for the Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

June 26, 1967.

**OPINION OF THE UNITED STATES
COURT OF APPEALS.**

United States Court of Appeals
For the Eighth Circuit.

No. 18,473.

Appeal from the United States District Court for the
Eastern District of Missouri.

[June 26, 1967.]

Before Blackmun, Mehaffy and Lay, Circuit Judges.

Blackmun, Circuit Judge.

This case comes close to raising nakedly the question whether, in the absence of federal and state open housing legislation, an owner of a home, which is on the market for sale, may refuse to sell that home to a willing purchaser merely because that purchaser is a Negro. The district court has phrased the sensitive issue, in the case's factual context, as follows:

“[T]he issue is whether the willful refusal of an owner of private property who is developing a private subdivision thereon to sell a part of his property to a Negro solely because of race entitles the person so discriminated against, under any presently applicable federal law, either to damages or to a mandatory injunction or both.”

The case is here by way of an appeal by the plaintiffs from the dismissal of their complaint for failure to state a cause of action. Judge Regan's comprehensive memorandum is reported as *Jones v. Alfred H. Mayer Co.*, 255 F. Supp. 115 (E. D. Mo. 1966). We are favored with help-

ful briefs by the parties and by the National Committee Against Discrimination in Housing which, as amicus curiae, urges reversal particularly in the light of the Civil Rights Act of 1866 and its present codification as 42 U. S. C. § 1982. Jurisdiction is established under 28 U. S. C. § 1343 (3) and (4).

A. *The Facts.* Because the motion to dismiss was granted, the facts, so far as this appeal is concerned, are those well pleaded in the complaint. *Cooper v. Pate*, 378 U. S. 546 (1964); *Jenson v. Olson*, 353 F. 2d 825, 828 (8 Cir. 1965); *Bonnot v. Congress of Independent Unions*, 331 F. 2d 355 (8 Cir. 1964); *McCleneghan v. Union Stock Yards Co.*, 298 F. 2d 659, 662-63 (8 Cir. 1962).

The plaintiffs, Joseph Lee Jones and Barbara Jo Jones, are husband and wife. Joseph Lee Jones is a Negro. Both are federal employees and Missouri citizens. The defendants, four in number, are Alfred H. Mayer Company, a corporation engaged in the business of developing subdivisions in Saint Louis County, Missouri, and of constructing homes to be sold to the public; Alfred Realty Co., a Missouri licensed¹ corporate real estate broker acting as the exclusive sales agent for Mayer houses; Alfred H. Mayer who owns the controlling interest in both corporations, who is their managing officer, and who also is licensed by Missouri as a real estate salesman; and Paddock Country Club, Inc., a corporation controlled by the other defendants "for the primary use and benefit of the people in" Paddock Woods, a subdivision which the defendants are presently developing.

In June 1965 plaintiffs were looking for a new home and, in consequence of an advertisement in the St. Louis Post-Dispatch, went to Paddock Woods, picked up a bro-

¹ Presumably pursuant to V. A. M. S., ch. 339, and particularly §§ 339.020 and .030.

chure describing the development there, and inspected display homes on the site. They determined that a certain style of house suited their needs and resources and was reasonably accessible to their places of employment. According to the defendants' promotional material this house could be built and sold for \$28,195. The plaintiffs selected a lot as their first choice among those available in the subdivision. The defendants, through their agents, "refused to consider Plaintiffs' application to purchase a house and to enter into a contract for the sale of a house and lot, because Joseph Lee Jones is a Negro, and it is Defendants' general policy not to sell said houses and lots to Negroes".

The complaint also recites: Paddock Woods includes more than 100 projected homes, with more plots to be opened. The ultimate result will be a suburban community of about a thousand people "living in an area chosen by Defendants for development, residing in homes designed and built by Defendants, driving on streets built by Defendants, playing golf on the nearby eighteen (18) hole course built by Defendants for the convenience of residents of [this and other nearby subdivisions developed by Defendants], and enjoying the facilities of the nearby bath and tennis club which Defendants plan to open * * * for the exclusive use of residents of Paddock Woods".

The complaint further alleges state and municipal involvement by the Missouri incorporation of the three corporate defendants; the protection afforded the defendants "by various state laws and local ordinances, in particular zoning codes, building codes, banking and lending laws, and numerous laws effecting the transfer and development of real property"; the approval of plans by the county building commissioner; the furnishing of sewer service by the metropolitan district; the responsibility of the planning commission for zoning; the county recording of trans-

fers and restrictions; the availability of the traffic and highway departments and the county engineer; the education of children in a tax supported school district; and the furnishing of electric and gas services by state licensed utilities. It is also alleged that Paddock Woods is "enlarged" by the defendants' other nearby developments "all of which are financed by loans insured by the Federal Housing Administration".

There is no allegation of federal or state monetary assistance in the development of the Paddock Woods subdivision. The amicus brief states flatly that "it is conceded for this appeal that defendants have not accepted any form of direct state or federal aid or financing which might have subjected them to federal statutes or executive orders or constitutional provisions which bar recipients from engaging in discrimination based on race in using the benefits of such aid in their project".

The prayer asks for \$50 ordinary damages, \$10,000 punitive damages, and injunctive relief.

It is against these facts that the defendants' motion to dismiss was filed.

B. The Grounds Asserted. The complaint alleges violation of rights under the Civil Rights Acts of 1866, 1870 and 1871, from which 42 U. S. C., §§ 1982, 1981, and 1983, are respectively derived; under §§ 201 to 207 of the Civil Rights Act of 1964, 42 U. S. C., §§ 2000a to 2000a-6, relating to public accommodations; under Executive Order No. 11063, entitled "Equal Opportunity in Housing", 27 F. R. 11527 (1962); under the Thirteenth and Fourteenth Amendments; and under the enabling clause of Article I, § 8, and the supremacy clause of Article VI of the Constitution. The 1964 Act and the Executive Order, however, are not urged on the appeal.²

² The Public Accommodations Subchapter of the 1964 Act relates to "any place of public accommodation" as therein defined,

The plaintiffs argue that the complaint states facts which constitute a violation of rights, guaranteed to them by § 1982, to purchase property without discrimination; (2) that § 1982 is valid and applicable whether or not "state action" is involved; and (3) that, in any event, the discrimination suffered by the plaintiffs results from state action. The amicus argues similarly, stresses that § 1982 is applicable here without regard to the presence of any indicia of state action, and relies particularly on the legislative history. It urges that there is an "imperative need for speedy federal action to help break down the walls of housing prejudice"; that the use of federal and state power "cannot wait for a reluctant Congress"; that "Builders of white suburban communities must not be allowed to spread the plague of housing segregation"; and that "since 1866 there has been federal legislation which bars racial discrimination in the sale or lease of real property". The amicus views the issue of the applicability here of § 1982 as "a novel issue, never before presented to the federal courts".³

The appeal, thus, pivots primarily on § 1982.

The defendants, in response, claim that the plaintiffs, in order to make a case under the section, must show that state action is present and that the facts alleged do not constitute conduct involving state action.

C. *The Statutes.* These read:

"§ 1982. Property rights of citizens

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed

that is, to hotels, restaurants, theatres, and the like. The Executive Order, Section 101, concerns functions of the executive branch of the federal government which "relate to the provision, rehabilitation, or operation of housing and related facilities". It seems obvious that neither has direct application here.

³ See, however, Justice (now Judge) Edgerton in dissent in *Hurd v. Hodge*, 162 F. 2d 233, 235, 240-41 (D. C. Cir. 1947).

by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

“§ 1981. Equal rights under the law

“All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

“§ 1983. Civil Action for deprivation of rights

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”

D. *The Chronology.* The history of § 1982, of the companion §§ 1981 and 1983, and of the Thirteenth and Fourteenth Amendments, is not without interest and significance and we examine it.

1. The Thirteenth Amendment (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction”, plus an enabling section) was certified by the Secretary of State on December 18, 1865. 13 Stat. 774.

2. The first of the civil rights statutes was the Act of April 9, 1866, ch. 31, 14 Stat. 27.⁴ It is evident from its language that this statute is the precursor of both the present § 1982 and § 1981. It has been recognized that the Act, which was passed over the first President Johnson's veto within four months after the Thirteenth Amendment became effective, came about "by virtue of this amendment". *United States v. Harris*, 106 U. S. 629, 640 (1882); *Civil Rights Cases*, 109 U. S. 3, 22 (1883); *United States v. Morris*, 125 F. 322, 323 (E. D. Ark. 1903).

3. The Fourteenth Amendment (citizenship; privileges and immunities; due process; equal protection; other provisions; and an enabling section) passed the United States Senate on June 8, 1866, and the House on June 13 of that year, and thus was proposed on the latter date. *Cong. Globe*, 39th Con., 1 Sess., 3042, 3148-49. It was certified finally by the Secretary of State on July 28, 1868.

It is thus at once apparent that the 1866 statute was enacted prior to the formal proposal of the Fourteenth Amendment. This fact has been judicially noted. *United States v. Price*, 383 U. S. 787, 804 (1966); *Hurd v. Hodge*, 334 U. S. 24, 32 (1948); *Oyama v. California*, 332 U. S. 633, 640 (1948); *Civil Rights Cases*, supra, p. 22 of 109 U. S.;

⁴ "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

County of San Mateo v. Southern Pac. R. R., 13 F. 145, 149 (C. C. D. Cal. 1882, Mr. Justice Field); *Slaughter-House Cases*, 83 U. S. (16 Wall.) 36, 83, 91 (1872), Mr. Justice Field dissenting.

4. The second civil rights statute was the Enforcement Act of May 31, 1870, ch. 114. Section 16 of that Act, 16 Stat. 144, did not include the words "to inherit, purchase, lease, sell, hold, and convey real and personal property", which were in the 1866 statute, but otherwise did contain, with minor exceptions immaterial here, the earlier Act's language now found in § 1981. The Supreme Court has characterized § 16 as "patterned after § 1 of the Civil Rights Act of 1866". *Hurd v. Hodge*, supra, p. 31 of 334 U. S., footnote 7. Moreover, § 18 of the 1870 Act provided flatly that the 1866 Act "is hereby re-enacted". The resulting codification effect, therefore, appears to have been the separation of the property right guaranties for non-white citizens from the more generally stated equality provisions.

It has been noted that there were doubts in some quarters as to the constitutional validity of the 1866 Act; that the first section of the Fourteenth Amendment had as one of its purposes the elimination of such doubts; and that those doubts were removed by the amendment. *Hurd v. Hodge*, supra, pp. 32-33 of 334 U. S., and Mr. Justice Field dissenting in the *Slaughter-House Cases*; supra, pp. 93 and 97 of 83 U. S. (16 Wall.), and in *Ex Parte Virginia*, 100 U. S. 339, 349, 364-65 (1879), and partially concurring in *Virginia v. Rives*, 100 U. S. 313, 324, 333 (1879).

5. Section 1 of the Enforcement or Anti-Lynching or Ku Klux Klan Act of April 20, 1871, ch. 22, 17 Stat. 13, was a forerunner of what is now § 1983. It provided liability and redress for certain deprivations of civil rights. It referred specifically to the 1866 Act. Its title was "An Act to enforce the Provisions of the Fourteenth Amend-

ment. * * * The Supreme Court has described the Act as "one of the means whereby Congress exercised the power vested in it by §5 of the Fourteenth Amendment to enforce the provisions of that Amendment". *Monroe v. Pape*, 365 U. S. 167, 171 (1961).

6. The next pertinent and, until 1957, the last civil rights act was that of March 1, 1875, ch. 114, 18 Stat. 335. Its first two sections were declared unconstitutional in the Civil Rights Cases, *supra*, 109 U. S. 3 (1883).

From this chronology one sees, in summary, that the 1866 Act followed immediately upon the Thirteenth Amendment; that it became law before the Fourteenth Amendment was proposed by Congress; that the Fourteenth Amendment was directed to situations not reached by the Thirteenth or by the 1866 Act, or, at least, only questionably covered by them; that, seemingly, the 1870 and 1871 Acts were an implementation of the Fourteenth Amendment; and that the 1866 statute was reenacted as part of the 1870 Act.

E. *The Fourteenth Amendment's §1 and state action.* There is no question that §1 and its guaranties of privileges and immunities and equal protection are directed at and prohibitive of "state action". The language, "No State shall" and "nor shall any State deprive", is indicative and clear. It would seem to follow that enabling legislation, to the extent it is enacted in enforcement of the Amendment's first section is so to be directed and is so limited. It was on an approach of this kind that the first two sections of the 1875 Act, relating to equal enjoyment of places of public accommodation were held unconstitutional in 1883:

"The first section of the Fourteenth Amendment * * * is prohibitory in its character, and prohibitory upon the States. * * * It is State action of a par-

ticular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment. * * * [U]ntil some State law has been passed, or some State action through its officers or agents has been taken * * * no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity. * * * The wrongful act of an individual, unsupported by any [State] authority, is simply a private wrong, or a crime of that individual." Civil Rights Cases, supra, pp. 10, 11, 13 and 17 of 109 U. S.

Significant state action has been the consistent measuring stick under §1 of the Fourteenth Amendment. *Virginia v. Rives*, supra, p. 333 of 100 U. S.; *United States v. Harris*, supra, pp. 638-39 of 106 U. S.; *Corrigan v. Buckley*, 271 U. S. 323, 330 (1926); *Shelley v. Kraemer*, 334 U. S. 1, 13 (1948); *Hurd v. Hodge*, supra, p. 31 of 334 U. S.; *Burton v. Wilmington Parking Authority*, 365 U. S. 715, 721-22 (1961); *United States v. Guest*, 383 U. S. 745, 754-56 (1966); *United States v. Price*, supra, p. 799 of 383 U. S.; *Reitman v. Mulkey*, — U. S. — (1967).

F. *State action and §1982*. Despite the facts of chronological priority of the Act of 1866 over the Fourteenth Amendment and the derivation of §1982 from the 1866 Act, is this section nevertheless infected today with any limitation of scope and application attendant upon the Amendment's first section and federal legislation which enforces it?

There are definite indications in Supreme Court opinions that the 1866 Act and §1982 are subject to the limitations of the Amendment's first section and are not now to be regarded as direct legislation implementing, instead, the Thirteenth Amendment. In *Virginia v. Rives*, supra, p. 333 of 100 U. S., Mr. Justice Field said, "After [the Fourteenth Amendment's] adoption the Civil Rights Act was

re-enacted, and upon the first section of that amendment it rests". In *Ex Parte Virginia*, supra, p. 345 of 100 U. S., the Court said, "They [the Thirteenth and Fourteenth Amendments] were intended to be, what they really are, limitations of the power of the States". The Court in the Civil Rights Cases, supra, p. 16 of 109 U. S., discussed the 1866 Act and its enactment. It referred to the penal portion of the statute and its reference to state law. Although noting, p. 20, that the Thirteenth Amendment was self-executing and authorized enforcement legislation "primary and direct in its character", it observed that the Amendment was concerned with slavery. The Court said, pp. 22-24, that in 1866,

"Congress did not assume, under the authority given by the Thirteenth Amendment, to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship. * * * [T]he province and scope of the Thirteenth and Fourteenth Amendments are different; the former simply abolished slavery: the latter prohibited the States from abridging the privileges or immunities of citizens of the United States. * * * The amendments are different, and the powers of Congress under them are different. * * * The Thirteenth Amendment has respect not to distinctions of race, or class, or color, but to slavery. The Fourteenth Amendment extends its production to races and classes."

The public accommodations legislation then under challenge was held authorized by neither the Thirteenth nor the Fourteenth Amendments. The first Mr. Justice Harlan alone dissented. See *Buchanan v. Warley*, 245 U. S. 60, 78-79 (1917).

In *Corrigan v. Buckley*, supra, it was said, pp. 330-31 of 271 U. S.,

"The Thirteenth Amendment denouncing slavery and involuntary servitude * * * does not in other matters protect the individual rights of persons of the Negro race. * * * [T]hey [§§1981, 1982, and 1983], like the Constitutional Amendment under whose sanction they were enacted, do not in any manner prohibit or invalidate contracts entered into by private individuals in respect to the control and disposition of their own property."

Of particular significance is *Hurd v. Hodge*, supra, a case concerning restrictive clauses in private conveyances. Mr. Chief Justice Vinson, in speaking for five of the six Justices who passed on the case, directly related the 1866 Act to the Fourteenth Amendment and spoke of the "close relationship" between the two, "for that statute and the Amendment were closely related both in inception and in the objectives which Congress sought to achieve". Both the statute and the joint resolution "were passed in the first session of the Thirty-Ninth Congress. * * * It is clear that in many significant respects the statute and the Amendment were expressions of the same general congressional policy". Pp. 33 and 32 of 334 U. S. This is rather positive language.

There are seemingly contrary implications in *United States v. Morris*, supra, 125 F. 322 (E. D. Ark. 1903); where Judge Trieber made the historical distinction between the Thirteenth Amendment, on the one hand, and the Fourteenth and Fifteenth on the other, and observed, p. 324, "Congress is, therefore, authorized by the provisions of the thirteenth amendment to legislate against acts of individuals, as well as of the states, in all matters necessary for the protection of the rights granted by that amendment". Of like import, perhaps, are the comments of Judge Edgerton, in dissent, in *Hurd v. Hodge*, 162 F. 2d 233, 235, 240-41 (D. C. Cir. 1947).

G. *The expansion of the state action concept.* Although to this date the state action limitation has continued thus to be engrafted upon enabling legislation under the first section of the Fourteenth Amendment, and although we have these indications from the Supreme Court that the limitation applies to the 1866 Act and, consequently, to § 1982, we think we may safely observe, without belaboring the cases, that the Supreme Court and other courts in general have broadly viewed the concept of state action. Indeed, by this breadth of view they have ruled against and struck down discriminatory housing practices in a number of instances.

Shelley v. Kraemer, supra, 334 U. S. 1 (1948), is a leading example. There the Court held that state court enforcement of a private race discrimination agreement amounted to state action. The case involved an attempt to enforce such a restrictive covenant and thereby to void a sale by a willing white seller to a willing negro purchaser. Thus, the right to acquire property, which was "among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment", was interfered with, even though "the restrictive agreements, standing alone, cannot be regarded as violative" of Fourteenth Amendment rights. The companion case of *Hurd v. Hodge*, supra, 334 U. S. 24 (1948), concerned a similar restrictive covenant in the District of Columbia. The Court found it unnecessary to resolve the Fifth Amendment issue advanced but held that § 1982 prohibited judicial enforcement of the restrictive covenant. An alternative ground for the decision was national public policy which does not permit the federal court to do in the District what a state court may not do under the Fourteenth Amendment and the holding in *Shelley v. Kraemer*. Later *Barrow v. Jackson*, 346 U. S. 249 (1953), complemented *Shelley* by denying damages for breach of a racially restrictive covenant.

State action has also been found in any significant participation or involvement in property. *Burton v. Wilmington Parking Authority*, supra, 365 U. S. 715 (1961) (privately owned restaurant in a building owned and operated by a state agency for public purposes); *Derrington v. Plummer*, 240 F. 2d 922 (5 Cir. 1956), cert. denied 353 U. S. 924 (cafeteria in a county courthouse); *Buchanan v. Warley*, supra, 245 U. S. 60 (1917) (racial zoning laws); *Pennsylvania v. Board of Directors*, 353 U. S. 230 (board appointed under a statute, of a school funded by a will); *Evans v. Newton*, 382 U. S. 296 (1966) (city supervision of a park); *Banks v. Housing Authority*, 260 P. 2d 668 (Cal. Dist. Ct. App. 1953) (public housing development); *Smith v. Holiday Inns of America, Inc.*, 336 F. 2d 630 (6 Cir. 1964) (motel on land purchased from housing authority in redevelopment project promoted with public funds); *Ming v. Horgan*, 3 Race Rel. L. Rep. 693 (Cal. Super. Ct. 1958) (FHA and VA insured subdivisions). See *Robinson v. Florida*, 378 U. S. 153 (1964); *Anderson v. Martin*, 375 U. S. 399 (1964); *Lombard v. Louisiana*, 373 U. S. 267 (1963); *Peterson v. Greenville*, 373 U. S. 244 (1963); *McCabe v. Atchison, T. & S. F. Ry.*, 235 U. S. 151 (1914); *Boman v. Birmingham Transit Co.*, 280 F. 2d 531 (5 Cir. 1960); 3 ALR 2d 466; 14 ALR 2d 153.

There are instances in this area where courts have refused to find state action and have denied the requested relief. *Barnes v. City of Gadsden*, 174 F. Supp. 64 (N. D. Ala. 1958), aff'd 268 F. 2d 593 (5 Cir. 1959), cert. denied 361 U. S. 915 (city housing authority carrying out a slum clearance program); *Dorsey v. Stuyvesant Town Corp.*, 299 N. Y. 512, 87 N. E. 2d 541 (1949), cert. denied 339 U. S. 981 (low cost housing corporation organized under state redevelopment law); *Johnson v. Levitt & Sons*, 131 F. Supp. 114 (E. D. Pa. 1955) (subdivision developer with mortgages guaranteed by FHA and VA); *Hackley v. Art Builders, Inc.*, 179 F. Supp. 851 (D. Md. 1960) (housing project).

H. *The possible incipient emergence from the shackles of the state action limitation.* Over and beyond this generally broad and seemingly expanding approach to the concept of state action are certain indications in recent Supreme Court opinions that state action is shrinking as a factor of deterrent influence in the area of discrimination. The new attitude seems to focus on other provisions of the Constitution or generously on the enabling §5 of the Fourteenth Amendment and congressional action thereunder, rather than on the narrow state-confined feature of the amendment's first section.

Perhaps the first intimation of this is in the companion cases of *Heart of Atlanta Motel, Inc. v. United States*, 379 U. S. 241 (1964), and *Katzenbach v. McClung*, 379 U. S. 294 (1964), where the Court, through the commerce clause, struck down discriminatory practices. The Court there upheld certain portions of the public accommodations title of the Civil Rights Act of 1964, 78 Stat. 241, 243. Section 201 of the Act, 42 U. S. C., §2000a, prohibits discrimination in any place of public accommodation and defines as such a place each of a number of described enterprises "if its operations affect commerce or if discrimination or segregation by it is supported by State action". As noted, the Court relied on the commerce clause and refrained from passing on the issue of state action. Mr. Justice Douglas, in concurrence, p. 279, was reluctant to rest solely on the commerce clause. He preferred to rest on the Fourteenth Amendment's enabling §5 and expressed the thought that discrimination enforced by officials of a state or political subdivision thereof is state action. Mr. Justice Goldberg, in concurrence, p. 291, also relied on the Fourteenth Amendment's §5 as well as the commerce clause.

Mr. Justice Clark, in the primary opinion in *Heart of Atlanta* made specific reference, pp. 250-52, to the Civil Rights Cases and stated that that decision was without

precedential value because the public accommodations provisions of the 1875 Act were not limited to businesses impinging on interstate commerce; because a business which in 1875 was not within the ambit of the commerce power was not necessarily outside it today; and because the government in the Civil Rights Cases had not relied on the commerce power and there is language in the opinion which indicates the Court "did not fully consider whether the 1875 Act could be sustained as an exercise of the commerce power".

Of greater significance are the several opinions in *United States v. Guest*, supra, 383 U. S. 745 (1966). That case concerned an indictment for criminal conspiracy, in violation of 18 U. S. C., § 241 ("to injure * * * any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States"), to interfere with the free enjoyment by Negroes of state owned facilities and with their right to travel freely over interstate highways in Georgia. In its primary opinion the Court again acknowledged that the Fourteenth Amendment protected only against state action and not against wrongs by individuals, but said, p. 755, "This is not to say, however, that the involvement of the State need be either exclusive or direct". It held, pp. 756-57, that an allegation of causing Negroes' arrest by means of false reports that they had committed criminal acts was broad enough, as against a motion to dismiss, to cover a charge of connivance by state agents and, pp. 758-59, that the right to travel interstate is a constitutional right, although not explicitly mentioned in the Constitution. This, of course, could be just another example of the broad approach to the state action concept.

However, Mr. Justice Clark, joined by Mr. Justice Black and Mr. Justice Fortas, separately concurred; p. 761, noting that the court avoided the question whether Congress

could punish private conspiracies which interfered with Fourteenth Amendment rights. But he observed that, despite the Court's rejection of "any such connotation, * * * there now can be no doubt that the specific language of § 5 [of the Fourteenth Amendment] empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights".

Mr. Justice Brennan, joined by the Chief Justice and Mr. Justice Douglas, p. 774, was specific. He felt that the statute reached a private conspiracy to interfere with equal utilization of state facilities, for this was interference with a right secured by the Constitution, within the statute's meaning, "without regard to whether state officers participated in the alleged conspiracy." P. 777. The statute was an exercise of congressional power under the Fourteenth Amendment's enabling clause. It prohibits all conspiracies. A right is "secured" by the Constitution "if it finds its source in the Constitution". He acknowledged that "an aspect" of the Civil Rights Cases confined the power of Congress but, p. 783, "I do not accept—and a majority of the Court today rejects—this interpretation of § 5. He concluded that a majority "expresses the view today that § 5 empowers Congress to enact laws punishing all conspiracies to interfere with the exercise of Fourteenth Amendment rights, whether or not state officers or others acting under the color of state law are implicated in the conspiracy". P. 782. See, also, the companion case of *United States v. Price*, supra, 383 U. S. 787 (1966), and Mr. Justice Goldberg, concurring, in *Bell v. Maryland*, 378 U. S. 226, 286, 302-03, 305-11 (1964).

Hurd v. Hodge is not cited in *Heart of Atlanta*, *McClung*, *Guest*, or *Price*.

These recent opinions imply for us a change of course. Certainly the opinions in *Guest* indicate that the reasoning

of the Civil Rights Cases is in the process of reevaluation, if not overruling, and that a court may not need to stretch to find state action if appropriate congressional legislation is present.

All this leads us at last to the basic issue in the present case. Does § 1982, which is already on the books and which is derived from the Civil Rights Act of 1866, reach discrimination in private subdivision housing?

Three approaches are possible: That of the Thirteenth Amendment; that of the Fourteenth Amendment; and that of relating the private subdivision to a governmental function.

A. The Thirteenth Amendment. It may be argued that the right to purchase real property, a right assured by § 1982, is violated when a seller refuses to do business with a willing Negro purchaser. The Thirteenth Amendment theory here would have to be that such discrimination imposes a "badge of slavery". This is precisely the approach used by Judge Trieber in *United States v. Morris*, supra, 125 F. 322 (E. D. Ark. 1903). He there concluded that under the Thirteenth Amendment Congress has the power to protect the enjoyment of fundamental rights, "if the deprivation of these privileges is solely on account of his race or color, as a denial of such privileges is an element of servitude within the meaning of that amendment". P. 330.

There are, however, difficulties today with this Thirteenth Amendment approach. *United States v. Morris* seems to be the only supporting authority (other than, perhaps, Judge Edgerton's dissent, hereinabove noted, pp. 240-41 of 162 F. 2d). The facts are not too clear, but that case has overtones of the deprivation of a right to pursue a vocation (farming) and thus seems to involve more than

a simple right to purchase a home from an unwilling seller. Further, the reasoning in *Morris*, despite its having been decided later and despite its citation of the Civil Rights Cases, is basically contrary to the Civil Rights Cases where it was stated, pp. 21-25 of 109 U. S., that the denial of access to public accommodations was not the imposition of a badge of slavery. Also, *Hurd v. Hodge*, *supra*, so long as it stands free and unmolested in the reports, gives us great difficulty. As we have noted, the Supreme Court there stressed the 1870 reenactment and imposed upon § 1982 a distinct and definite Fourteenth Amendment overlay with the state action limitation. While we feel that the implications of *Hurd v. Hodge* could be regarded as greatly offended and restricted by the sweep of the language in *United States v. Guest*, the Supreme Court did not itself express concern about *Hurd v. Hodge* and, indeed, did not even cite it. It is not for our court, as an inferior one, to give full expression to any personal inclination any of us might have and to take the lead in expanding constitutional precepts when we are faced with a limiting Supreme Court decision which, so far as we are told directly, remains good law.

B. The Fourteenth Amendment. Section 1982 was re-enacted under the authority of the Fourteenth Amendment. Clearly, therefore, the right to purchase property may not be encroached by state action. It is perhaps arguable that under the *Guest* rationale this right may not be violated by purely private action.

But what is this right to purchase? It is usually taken for granted that an owner may turn down any inquiring purchaser; in this sense there is no difference between a right to purchase possessed by a Negro and that possessed by a white. However, when the owner puts his property on the market, perhaps there is a difference. If it is placed on the market for whites only, whites have

a right denied to Negroes. A right to purchase will be of limited scope if it can be denied or destroyed by those who place property on the market. See Robison, *The Possibility of a Frontal Attack on the State Action Concept*, 41 Notre Dame Law 455. (1966).

On the other hand, there is a significant historical fact in all this. Clearly, one of the purposes of the Thirteenth and Fourteenth Amendments and of the 1866 Act and of § 1982 was to give the Negro citizenship and the right to own property and thus to acquire and to dispose of it. These were abilities which he did not possess under slavery. They are more fundamental than an ability to purchase from a seller. No one here challenges the right of these plaintiffs to own or to acquire real property. That purpose of the Amendments has been entirely fulfilled. But the plaintiffs claim a right to purchase a particular piece of property when the owner places it on the market. Is this, too, something which the Fourteenth Amendment goes so far as to reach?

There is another and opposing factor which deserves comment. A Fourteenth Amendment argument may have greater force in the case of the large real estate developer. He is in the business of selling homes and occupies a position somewhat different than that of the individual home owner. And a collateral supporting thesis was presented by Mr. Justice Douglas in his concurrences in *Garner v. Louisiana*, 368 U. S. 157, 176, 185 (1961), and in *Reitman v. Mulkey*, *supra*, where he asserted that when a business is licensed it is because the business is affected with a public interest; that the public, as a consequence, has rights in respect thereto; and that it would be unconstitutional for the state to license a public business for the use of one race only. Yet licensing and subdivision factors alone were not deemed to be "exertions of state power" even in *Ming v. Horgan*, *supra*.

Thus, the Fourteenth Amendment's approach presents us with difficulties.

C. Governmental function. The argument is that a housing development, even though privately financed and built, is in effect the equivalent of a municipality and, thus, the private developer is carrying on a governmental function requiring the application of non-discriminatory standards. It is said that the state plays an important part in the success of the private housing development. It does so by way of licensing and regulation of the real estate business; zoning laws and building codes; required approval of subdivision plans; schools; utilities; police and fire services; and the like. In the private development a board of trustees usually manages the community, holds title to the streets, levies assessments for community services, and provides recreational facilities. It is asserted, then, that it is a denial of equal protection for the state to allow private persons discriminatorily to carry out what are governmental functions. See *Marsh v. Alabama*, 326 U. S. 501 (1946), where the Court imposed First and Fourteenth Amendment freedom of religion and press guaranties upon a company-owned town, and the white primary cases. *Nixon v. Condon*, 286 U. S. 73 (1932); *Smith v. Allwright*, 321 U. S. 649 (1944); *Terry v. Adams*, 345 U. S. 461 (1953), where the Court imposed the Fifteenth Amendment guaranty upon private political parties performing state election functions. The relationship of ownership of real property to the sovereignty of the state may also be stressed.

The difficulties with any application of the governmental function argument are that, to a large extent, it relies on state inaction, rather than state action, see *Mulkey v. Reitman*, 64 Cal. 2d 529, 413 P. 2d 825, 834 (1966), affirmed — U. S. —; it relies upon state assistance which is non-discriminatory in itself; and it necessarily concerns

the ever elusive judicial determination, as contrasted with a legislative one, of what is a governmental function.

It would not be too surprising if the Supreme Court one day were to hold that a court errs when it dismisses a complaint of this kind. It could do so by asserting that § 1982 was, because of its derivation from the Thirteenth Amendment, free of the shackles of state action despite what has been said in *Hurd v. Hodge*. It could do so by asserting that, even though § 1982, because of its reenactment, was subject to Fourteenth Amendment limitations, we nevertheless have, on the accepted facts here, enough to constitute state action in the light of the expanding concept of that term. And it could do so on the ground, suggested in *Guest*, that state action is no longer a factor of limitation and that Congress has acted through § 1982 to reach private discrimination in housing.

We feel, however, that each of these approaches, at the present time, falls short of justification by us as an inferior tribunal. The Thirteenth Amendment approach has been made hazy and obscure by the 1870 reenactment and by the pronouncements in *Hurd v. Hodge*. The Fourteenth Amendment approach still carries the condition of state action. And the governmental function approach finds little helpful majority precedent in a legion of decided cases. Those where relief has been granted involve factual elements of far greater depth and significance than are present here. On this complaint we do not even have the thin gloss of governmental agency mortgage service in Paddock Woods.

Relief for the plaintiffs lies, we think, in fair housing legislation which will be tempered by the policy and exemption considerations which enter into all thoughtfully considered statutes. Recent cases indicate that, if properly drawn, such legislation would encounter little constitutional objection. *United States v. Price*, supra, p. 789 of

383 U. S.; *Colorado Anti-Discrimination Comm'n v. Case*, 380 P. 2d 34 (Colo. 1962); *Massachusetts Comm'n Against Discrimination v. Colangelo*, 344 Mass. 387, 182 N. E. 2d 595 (1962). The power exists but its exercise is absent. The matter, thus, is one of policy, to be implemented in the customary manner by appropriate statutes directed to the need. If we are wrong in this conclusion the Supreme Court will tell us so and in so doing surely will categorize and limit those of its prior decisions, cited herein, which we feel are restrictive upon us.

A concluding word is indicated about the Supreme Court's very recent five to four decision in *Reitman v. Mulkey*, supra, — U. S. — (1967), concerning California's Proposition 14, added by initiative to that State's Constitution. The majority there concluded that positive state action "embodied in the State's basic charter, immune from * * * regulation at any level of the state government", as the California Supreme Court had found, was present and, being discriminatory, was violative of the Fourteenth Amendment. Mr. Justice Douglas, in concurrence, went further and, while perhaps recognizing that the situation might be different in "a case as simple as the one where a man with a bicycle or a car or a stock certificate or even a log cabin asserts the right to sell it to whomsoever he pleases", felt that the Court was dealing "with a problem in the realm of zoning", that "urban housing is in the public domain", and that "Leaving the zoning function to groups who practice racial discrimination and are licensed by the States constitutes state action in the narrowest sense in which *Shelley v. Kraemer*, supra, can be construed". The four dissenters, although conceding that the adoption of Proposition 14 by initiative constituted "state action", concluded that it embraced no affirmative and purposeful governmental enforcement which fostered discrimination and that, as a consequence, there was no impermissible deprivation of equal protection.

We therefore must assume that, because of licensing by Missouri of the defendants Alfred H. Mayer and Alfred Realty Co. as a real estate salesman and broker, Mr. Justice Douglas would conclude that our affirmance of the district court here is error. We feel, however, that the four dissenters, who were unimpressed with the fact of California licensing in *Reitman v. Mulkey*, would be unimpressed with the fact of Missouri licensing here and would not find impermissible state action in the legislative vacuum of the present case. And we believe that the four members of the *Reitman* majority, who did not join Mr. Justice Douglas in the grounds stated for his concurrence, also would not be inclined to find much substance, so far as the present issue is concerned, in Missouri's licensing of the Mayers. We therefore conclude that our decision to affirm the district court in the present case is in line with the implications flowing from both the majority and the dissenting opinions in *Reitman v. Mulkey* and, indeed, is compelled by those opinions. The views entertained by Mr. Justice Douglas, of course, would require the opposing result.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

